

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 2004-0325, State of New Hampshire v. Darlene Sherman, the court on November 22, 2005, issued the following order:

The defendant, Darlene Sherman, appeals her conviction for falsifying physical evidence. RSA 641:6 (1996). She also challenges the portion of her sentence requiring her to pay restitution. We affirm the conviction but vacate the restitution order.

The defendant managed the King's Grant Inn in Gilford. On August 3, 2002, Jesse Mulder arrived at the Inn, where he was given a wristband and allowed to enter. After consuming alcohol, playing pool and dancing, Mulder began to feel hot and dizzy and headed for an exit. He blacked out, and was later found unconscious by the defendant in a hallway inside the building. At the defendant's instruction, Wanda Allen, a club employee, retrieved her husband, Ed Allen, who carried Mulder outside to a grassy area. The defendant devised a plan, telling Wanda and Ed to say that Mulder had been found outside, and explaining to Wanda that by saying that, they could say that Mulder wasn't in the club that night. The police were notified, and before they arrived, the defendant removed the wristband from Mulder's wrist. The defendant told the police that Mulder had been found outside, and that he had not been in the Inn that night.

At trial, Lisa Miles, a bartender at the Inn, testified to a discussion that occurred on August 5 with the defendant, Wanda and Ed. She testified that the gist of the discussion was that the statement that was to be made was that Mulder was found in the parking lot, and that there was a possibility of loss of liquor license. When asked whether the defendant had made the statement regarding the loss of license, Miles indicated that she had made that statement at some point, although not necessarily during the August 5 discussion.

Nicholas Houhoulis, an investigator from the liquor commission, testified that during his investigation of this incident, he spoke with the defendant, Miles, Wanda and Ed. He then had another conversation with the defendant, during which he asked her how 200 people could have left the Inn without seeing Mulder, and how did he get to where he was found. After the defendant replied that somebody probably just dropped him off, Houhoulis testified that he replied that that was improbable, that he thought Mulder had been in the club, and that he thought the employees were being less than truthful with him. The defendant

objected, and the court struck Houhoulis' statement that he thought Mulder had been in the club, but allowed his statement that he thought the employees were being less than truthful with him.

On appeal, the defendant first argues that the court erred in allowing Miles to testify about the defendant's statement regarding the loss of liquor license because the State had not previously provided the statement to the defense. In the witness statement that was provided during discovery, Miles stated that there were multiple conversations about the incident, during "which numerous points were discussed such as what would happen if the police [were] to find out what really had happened, and it would be more than likely to lose our liquor license So it was clear by all who were present that we were all under the understanding that it was the patron was [sic] found in the parking lot after closing and that he was not recognized as being in the club that night." While the witness statement did not specifically attribute the "loss of license" remarks to the defendant, the trial court could have concluded on the record in this case that the defendant was provided with sufficient notice of Miles' testimony. We conclude that the defendant has not demonstrated that the trial court unsustainably exercised its discretion by admitting this evidence. *See State v. Gamester*, 149 N.H. 475, 478 (2003).

We also reject the defendant's argument that the State violated Superior Court Rule 98(A)(1), which requires the State to provide the defendant with copies of all statements "made by the defendant to any law enforcement officer or his agent." Because Miles was neither a law enforcement officer nor an agent of a law enforcement officer, this rule did not apply to statements the defendant made to her.

The defendant next argues that the court erred by not striking Houhoulis' testimony that he told the defendant that he thought the employees were being less than truthful with him. Assuming without deciding that the admission of this evidence was error, we agree with the State that it was harmless beyond a reasonable doubt. Prior to Houhoulis' testimony, both Miles and Wanda Allen had testified regarding the false statements they had made to Houhoulis. In addition, Officer Seager testified that the defendant told her on the night of the incident that Mulder was found in the parking lot and that they had dragged him over to the grassy area, and that he was not at the Inn, which was consistent with the fabricated story. After a review of the record, we are persuaded that Houhoulis' testimony was merely cumulative or inconsequential in relation to the State's evidence of guilt. *See State v. Velez*, 150 N.H. 589, 594 (2004).

Finally, the State concedes that the trial court erred by ordering the defendant to pay restitution in the amount of \$394.45 towards Mulder's medical expenses. The State concludes its brief by requesting that the conviction be affirmed, and by stating that it "has no objection to vacating only the restitution

portion of the defendant's sentence." The State does not request in its brief that we remand for resentencing. Accordingly, we affirm the defendant's conviction, and vacate the restitution portion of the defendant's sentence.

Conviction affirmed; restitution order vacated.

NADEAU, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**